

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of)	
Telecommunications and Energy on its own)	
Motion into the Appropriate Regulatory Plan)	
to succeed Price Cap Regulation for)	D.T.E. 01-31-Phase II
Verizon New England, Inc. d/b/a Verizon)	
Massachusetts' intrastate retail telecommunications)	
services in the Commonwealth of Massachusetts)	

**THE ATTORNEY GENERAL'S MOTION TO STRIKE
PORTIONS OF AT&T'S REPLY BRIEF**

The Attorney General, pursuant to 220 C.M.R. §§ 1.04(5) and 1.11(7) and (8), hereby moves that the Department of Telecommunications and Energy ("Department") strike portions of the reply brief ("Reply Brief") of AT&T Communications of New England ("AT&T") that include, and refer to, extra-record evidence. The extra-record evidence and related argument that the Attorney General seeks to strike are:

1. A 1987 article ("Article") by William Baumol, Michael Koehn and Robert Willig entitled *"How Arbitrary Is 'Arbitrary'? - or, Toward the Deserved Demise of Full Cost Allocation,"* published in Public Utilities Fortnightly and attached at the end of AT&T's Reply Brief; and
2. The reference to the Article in the last three lines of page 12 of AT&T's Reply Brief.

I. STANDARD OF REVIEW

The Department's rules provide that "[n]o person may present additional evidence after having rested nor may any hearing be reopened after having been closed, except upon motion and showing of good cause." 220 C.M.R. § 1.11(8). The Department made it clear long ago that,

except for updates of routine information already provided on the record, *e.g.*, property tax bills, a motion to reopen must be filed and granted **before** the testimony or exhibits are “thrust upon the trier of fact,” noting that “one cannot un-ring a bell.” *Boston Gas Company*, D.P.U. 88-67(Phase II) at 7 (1989).

The Department reiterated aspects of its standard this week. *Fitchburg Gas and Electric Light Company*, D.T.E. 02-24/25, pp.8, 12-13 (December 2, 2002) (“[w]here an objection is raised to an argument by an opponent that is not supported by the record, the Department may strike all or part of the argument”, citing *Fitchburg Gas and Electric Light Company*, D.P.U. 19084, p. 6 (1977). The Department denied a motion to admit into evidence material submitted after hearings that falls outside of the category of “routine updates”).

II. ARGUMENT

AT&T attached the Article at the end of its Reply Brief and referred to the Article to support an argument. Reply Brief, p. 12. AT&T did not present the Article at trial and made no citation to the record for the Article, which was not part of the record. Before relying on the Article to support its argument on brief, AT&T did not make a motion to reopen the record and admit the Article in evidence, based on a showing of good cause. AT&T’s submission to the Department of non-routine, extra-record material and reliance on that material on brief, without the required prior motion, violate Department Regulations and precedent. 220 CMR 1.11(8); *Boston Gas Company*, D.P.U. 88-67 (Phase 2), p.7 (1989); *Fitchburg Gas and Electric Light Company*, D.T.E. 02-24/25, pp.12-13 (2002).

AT&T’s action also prejudiced the rights of other parties. Department “case law on late-filed exhibits is based upon the premise that late-filed exhibits are prejudicial because other

parties do not have the opportunity to conduct cross-examination regarding information contained in late-filed exhibits in order to test the accuracy of the data through the litigation process.” *Fitchburg Gas and Electric Light Company*, D.T.E. 98-51, p. 9 (1998); *New England Telephone and Telegraph Company*, d/b/a/ NYNEX, D.P.U. 94-50 at 62 (1995). Hence, only in limited circumstances has the Department found good cause to permit the submission of evidentiary documents into evidence following the close of evidentiary hearings. *See Payphone Inc.*, D.P.U. 90-171, p. 4-5 (1991) (fundamentally unfair to admit evidence not subject to cross examination). State administrative law requires that parties be given an opportunity to cross examine witnesses and present rebuttal evidence. G.L. c. 30A, § 11(3). Allowing AT&T to cite, reference or otherwise rely upon extra-record evidence that the Attorney General had no opportunity to cross-examine or rebut violates the Attorney General’s due process rights and the Department rules and precedent. *See MediaOne/New England Telephone*, D.T.E. 99-42/43, p. 17-18 (1999); *Boston Edison Company*, D.P.U. 90-335, p. 7-8 (1992); *Payphone Inc.*, D.P.U. 90-171, p. 4-5 (1991); *see also* G.L. c. 30A, § 11; and 220 C.M.R. §§ 1.11(4), 1.11(7); and 1.11(8).

Even if AT&T had followed the required procedure and filed a motion to reopen the record, there would be no good cause to admit it. AT&T could have moved to admit the Article in evidence during the hearings, but did not do so. The Article is not a “routine update” and is not “non-controversial.” This 1987 Article is not even new information; it is yet another example of AT&T’s persistent reliance on stale information to support its case. No extraordinary or compelling circumstances are evident. *Milford Water Company*, D.P.U. 92-101, at 36 (1992); *Bay State Gas Company*, D.P.U. 89-81, at 45 (1989).

Department precedent requires rejection of new arguments and testimony in a party’s

briefs, and establishes that the proper procedure is to “strike extra-record evidence from a brief and require the offending party to file a conforming brief without reference to the excluded evidence.” *Boston Edison Company v. Brookline Realty & Inv. Corp.*, 10 Mass.App.Ct. 63, 69 (1980). The Department has also used an alternative approach of “[striking] the offending portions from the brief and [] disregard those portions of the brief in reaching a decision in the case.” *AT&T Communications*, D.P.U. 91-79, p. 8 (1992), citing *Service Publications Inc. v. Goverman*, 396 Mass. 567, 580 (1986); *Hull Municipal Light Plant*, D.P.U. 87-19-A, p. 7 (1990); *Boston Edison Company*, D.P.U. 90-335, pp. 7-9 (1992).

III. CONCLUSION

The Department, therefore, should grant the Motion To Strike the Article and all references to it in AT&T’s Reply Brief.

Respectfully submitted,
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Dated: December 6, 2002

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on its own Motion into the Appropriate Regulatory Plan to succeed)	
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Commonwealth of Massachusetts)	Track B
)	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding by e-mail and either hand-delivery or U.S. mail.

Dated at Boston this 6th day of December, 2002.

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